No. 17-742

In The
Supreme Court of the United States

MARY ANNE SAUSE,

Petitioner,

v.

TIMOTHY J. BAUER, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF FORMER FEDERAL PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

WILLIAM R. PETERSON
LYNNE N. POWERS
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, Texas 77002
T. 713.890.5000
F. 713.890.5001

ALLYSON N. HO
Counsel of Record
JAMES D. NELSON
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
T. 214.466.4000
F. 214.466.4001
allyson.ho@morganlewis.com

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. This Court's Review Is Needed To Resolve A Serious Conflict With This Court's Cases That Threatens Vital Law-Enforcement Interests	4
II. Permitting The Tenth Circuit's Decision To Stand Would Undermine Vital Law-Enforcement Objectives	10
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Anderson v. *Creighton*, 483 U.S. 635 (1987) 6

Graham v. *Connor*, 490 U.S. 386 (1989) 13

Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 4

Hope v. *Pelzer*, 536 U.S. 730 (2002) 5, 6

O'Lone v. *Estate of Shabazz*, 482 U.S. 342 (1987) 11, 12

Pearson v. *Callahan*, 555 U.S. 223 (2009) 3, 6, 13

Safford Unified Sch. Dist. No. 1 v. *Redding*, 557 U.S. 364 (2009) 7

Salahuddin v. *Goord*, 467 F.3d 263 (2d Cir. 2006) 12

Salazar-Limon v. *City of Houston*, 137 S. Ct. 1277 (2017) 4

Tolan v. *Cotton*, 134 S. Ct. 1861 (2014) 5

Turner v. *Safley*, 482 U.S. 78 (1987) 12

United States v. *Lanier*, 520 U.S. 259 (1997) 5, 6, 7

White v. *Pauly*, 137 S. Ct. 548 (2017) 6, 7

RULES

SUPREME COURT RULE 37.2 1

SUPREME COURT RULE 37.6 1

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Edwin Meese III & John Malcolm, *Policing in America: Lessons from the Past, Opportunities for the Future*, HERITAGE FOUND. (Sept. 18, 2017), http://www.heritage.org/crime-and-justice/report/policing-america-lessons-the-past-opportunities-the-future 8, 9

Edwin Meese III & John Malcolm, *Solutions for Policing in the 21st Century*, HERITAGE FOUND. (Sept. 21, 2017), http://www.heritage.org/crime-and-justice/commentary/solutions-policing-the-21st-century 8

POLICE EXECUTIVE RESEARCH FORUM, CONSTITUTIONAL POLICING AS A CORNERSTONE OF COMMUNITY POLICING (Apr. 2015), https://ric-zai-inc.com/Publications/cops-p324-pub.pdf 8

Reauthorization of the Civil Rights Div. of the U.S. Dep't of Justice: *Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary House of Representatives*, 109th Cong. 3 (2005), https://www.usdoj.gov/crt/speeches/acosta_2005_oversight.pdf 9

TABLE OF AUTHORITIES—Continued

Page

U.S. DEP'T OF JUSTICE CMTY. RELATIONS SERV., COMMUNITY RELATIONS SERVICES TOOLKIT FOR POLICING: GUIDE TO CRITICAL ISSUES IN POLICING, https://www.justice.gov/crs/file/836416/download (last visited Dec. 14, 2017) 13

U.S. DEP'T OF JUSTICE CMTY. RELATIONS SERV., COMMUNITY RELATIONS SERVICES TOOLKIT FOR POLICING: IMPORTANCE OF POLICE-COMMUNITY RELATIONSHIPS AND RESOURCES FOR FURTHER READING, https://www.justice.gov/crs/file/836486/download (last visited Dec. 2, 2017) 10

U.S. DEP'T OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS (Sept. 2003), https://www.justice.gov/archive/crs/pubs/principlesofgoodpolicingfinal092003.pdf 7

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former federal prosecutors who have extensive familiarity with the needs of law enforcement and the challenges faced by law-enforcement officers in interacting with the public. They recognize the important role that qualified immunity plays in permitting reasonable police officers to exercise difficult judgments without fear of civil liability. They also recognize the important limits that this Court has drawn on qualified immunity, limits which reassure the public that officers who act in knowing disregard of the public's constitutional rights will be held liable for abuses.

Amici file this brief to emphasize that legitimate law-enforcement interests will not be undermined by denying qualified immunity based on the allegations in petitioner's complaint. To the contrary, reaffirming that officers who interfere with prayer for the purpose of harassment face civil liability will promote respect for the rule of law and strengthen relationships between the police and the public, ultimately easing the task of law enforcement.

---

[1] The parties in this case received timely notice under Rule 37.2(a) and have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Amici listed below urge this Court to grant the petition for certiorari and reverse the Tenth Circuit's judgment.

Edwin Meese III served as the 75th Attorney General of the United States from 1985 to 1988. He previously served as Counselor to the President and was a member of the National Security Council. He also previously worked in the District Attorney's Office of Alameda County, California, where he prosecuted felony cases. He currently sits on the National Advisory Board of the Center for Urban Renewal and Education and is a Distinguished Visiting Fellow with the Hoover Institution at Stanford University.

Matthew Orwig served as the U.S. Attorney for the Eastern District of Texas for six years. He previously served as a Legal Advisor in the Executive Office of U.S. Attorneys and as an Assistant U.S. Attorney in the Northern District of Texas. He served a total of three Presidents and five Attorneys General in the Department of Justice.

Richard Roper served as the U.S. Attorney for the Northern District of Texas, leading an office of 93 attorneys in criminal and civil matters. He previously served as Assistant U.S. Attorney and as Assistant District Attorney in Fort Worth, Texas—spending 26 years in these three positions. He has personally prosecuted more than 150 jury trials involving a broad range of crimes.

Joseph Russoniello served two terms as the U.S. Attorney for the Northern District of California.

Before that, he served as an Assistant District Attorney for the City and County of San Francisco and as a Special Agent with the Federal Bureau of Investigation. He also served on the U.S. Attorney General's Advisory Committee at the Department of Justice.

SUMMARY OF ARGUMENT

Just as the application of qualified immunity to officers who reasonably believed their conduct to be permissible is essential to allowing law enforcement to take discretionary actions without fear of liability, *Pearson* v. *Callahan*, 555 U.S. 223, 244 (2009), denial of qualified immunity and imposition of civil liability where appropriate is important to aid law-enforcement objectives by encouraging public trust and cooperation with legitimate law-enforcement investigatory efforts. This Court's review is needed to make clear that in cases like this one—where the constitutional violation is obvious—affording qualified immunity can actually hinder legitimate law-enforcement interests by straining the relationship between the public and the police.

In this case, the Tenth Circuit held that officers could reasonably believe that if interfering with prayer is justified in *some* circumstances, then interfering with prayer must be permissible in *all* circumstances—even if it is done solely for purposes of harassment. But the conclusion does not follow. Even if officers could permissibly interfere with prayer in some circumstances, no reasonable officer could

believe it permissible to interfere with prayer solely for purposes of harassment. And it is hardly surprising that no case has ever held—or had to hold—as much. If permitted to stand, the Tenth Circuit's decision threatens to upset the careful balance this Court has struck in its qualified-immunity precedent and to undermine vital law-enforcement objectives. The petition should be granted.

ARGUMENT

I. This Court's Review Is Needed To Resolve A Serious Conflict With This Court's Cases That Threatens Vital Law-Enforcement Interests.

Denying qualified immunity when officers violate "clearly established * * * constitutional rights of which a reasonable [officer] would have known," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), is just as important to law enforcement as granting qualified immunity when a right is unclear. See *Salazar-Limon* v. *City of Houston*, 137 S. Ct. 1277, 1283 (2017) (Sotomayor, J., dissenting from denial of certiorari) ("The erroneous grant of summary judgment in qualified-immunity cases imposes no less harm on society as a whole, than does the erroneous denial of summary judgment in such cases." (internal quotation marks and citations omitted)). That is so because erroneous grants of qualified immunity undermine the rule of law and strain the relationship between police and the public, hindering law enforcement in fulfilling its

responsibilities. Regrettably, this is just such a case. This Court's review is needed to correct the error, resolve the conflict with this Court's cases, and restore the proper relationship between law enforcement and the public.

As an initial matter, this Court has firmly rejected any "rigid gloss on the qualified immunity standard" that would require "the facts of previous cases [to] be 'materially similar' to" the case at hand. *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002); see also *Tolan* v. *Cotton*, 134 S. Ct. 1861, 1866 (2014). But that is precisely what the Tenth Circuit required here. App. 8a-10a (holding that petitioner could "only satisfy the clearly-established prong by citing a case or cases that make clear 'the violative nature of [the defendants'] *particular* conduct,'" i.e., "interrupt[ing] their investigation to order [her] to stop [praying] so that they can * * * briefly harass her before * * * issuing a citation" (first alteration in original)). The Tenth Circuit thus concluded that while respondents' conduct "may be obviously unprofessional, we can't say that it's 'obviously unlawful.'" App. 9a.

But this Court has held that "general statements of the law are not inherently incapable of giving fair and clear warning," and there are "general constitutional rule[s] * * * [that can] apply with obvious clarity to the specific conduct in question." *United States* v. *Lanier*, 520 U.S. 259, 271 (1997); see also *Hope*, 536 U.S. at 741 ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances[.]"). Cases involving "fundamentally

similar" or "materially similar" facts are "not necessary" for every reasonable officer to know of certain constitutional rights. *Hope*, 536 U.S. at 741.

This approach—i.e., permitting general rules to give fair and clear warning that officers' conduct is impermissible—is important because the most obvious and egregious constitutional violations will be least likely to be committed by police officers and thus least likely to be discussed in the case law. *Lanier*, 520 U.S. at 271 (explaining that "[t]he easiest cases don't even arise," but "it does not follow that if such a case arose, the officials would be immune" (citation omitted)). This Court thus holds that the "very action in question" need not have "been held unlawful" previously for an officer to be held liable. *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Any other rule would threaten to immunize the very worst violations. Regrettably, that is what the Tenth Circuit has done here. And in such cases, granting qualified immunity disserves citizens and law enforcement alike.

The holding below upsets the balance this Court has struck in its qualified immunity jurisprudence, which "is important to 'society as a whole.'" *White* v. *Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (citation omitted). "Qualified immunity balances * * * the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231. It strikes this balance by ensuring officials "reasonably can anticipate when their conduct may give

rise to liability," *Lanier*, 520 U.S. at 270, so they need not second-guess every discretionary action they take, while also prohibiting officers from "knowingly violat[ing] the law." *White*, 137 S. Ct. at 551 (citation omitted).

Perversely, under the Tenth Circuit's approach, qualified immunity would immunize the most flagrant constitutional violations—those that are so far outside the norm they infrequently arise. This concern is not merely theoretical. Often, the "easiest cases don't even arise" because "outrageous conduct" such as the conduct here "obviously will be unconstitutional." *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 377 (2009). The behavior described in petitioner's complaint is a perfect example. As Chief Judge Tymkovich's concurrence recognized, that behavior is nothing short of "reprehensible" and demonstrates "extraordinary contempt of a law abiding citizen." App. 17a. Immunizing such conduct serves no legitimate law-enforcement interest.

To the contrary, immunizing egregious behavior can harm those interests by communicating to the public that officers may violate the law with impunity. This message is just the opposite of what the public should understand: "The police must not only respect, but also protect the rights guaranteed to each citizen by the Constitution." U.S. DEP'T OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN

POLICE AND CITIZENS (Sept. 2003).[2] Public confidence in law-enforcement officials fulfilling their duty to respect and protect the public's constitutional rights is critical for effective law enforcement. See POLICE EXECUTIVE RESEARCH FORUM, CONSTITUTIONAL POLICING AS A CORNERSTONE OF COMMUNITY POLICING 3 (Apr. 2015)[3] ("It is impossible for law enforcement agencies to form positive and productive relationships with the communities they serve if those communities do not trust" them or if they "do not believe that the police see their mission as protecting civil rights as well as public safety.").

This cognizance is essential to build public trust in law-enforcement actions and motives. The public trust, in turn, is necessary for effective policing. Public distrust of police leaves both good officers and "Americans, particularly those living in low-income communities and minority communities, more at risk." Edwin Meese III & John Malcolm, *Solutions for Policing in the 21st Century*, HERITAGE FOUND. (Sept. 21, 2017)[4]; see also Edwin Meese III & John Malcolm, *Policing in America: Lessons from the Past, Opportunities for the Future*, HERITAGE FOUND. (Sept. 18, 2017)[5] (identifying

---

[2] Available at https://www.justice.gov/archive/crs/pubs/principlesofgoodpolicingfinal092003.pdf.

[3] Available at https://ric-zai-inc.com/Publications/cops-p324-pub.pdf.

[4] Available at http://www.heritage.org/crime-and-justice/commentary/solutions-policing-the-21st-century.

[5] Available at http://www.heritage.org/crime-and-justice/report/policing-america-lessons-the-past-opportunities-the-future.

"the breakdown in trust" between citizens and police officers—"which in turn reduces citizen cooperation"—as one of "the most pressing problems that law enforcement agencies face today"); *ibid.* (statement of Garry F. McCarthy, former Superintendent, Chicago Police Department) ("police cannot do their job without * * * understanding" and "trust").

Immunizing egregious officer behavior, however, can only increase tensions between citizens and law enforcement. See Reauthorization of the Civil Rights Div. of the U.S. Dep't of Justice: *Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary House of Representatives*, 109th Cong. 3 (2005) (prepared statement of R. Alexander Acosta, Assistant Attorney General for the Civil Rights Division, Department of Justice)[6] ("[I]t is of the utmost importance that officers obey the very laws that they enforce. The public must have the trust that no one, including a law enforcement officer, is above the law. Thus, failing to hold officers to account for their conduct, and allowing that trust to be undermined, would make the job substantially more difficult.").

"Strong relationships of mutual trust between police agencies and the communities they serve are critical to maintaining public safety and effective policing * * * * [C]ommunity members' willingness to trust the police depends on whether they believe that police actions reflect community values and incorporate the

---

[6] Available at https://www.usdoj.gov/crt/speeches/acosta_2005_oversight.pdf.

principles of procedural justice and legitimacy." U.S. DEP'T OF JUSTICE CMTY. RELATIONS SERV., COMMUNITY RELATIONS SERVICES TOOLKIT FOR POLICING: IMPORTANCE OF POLICE-COMMUNITY RELATIONSHIPS AND RESOURCES FOR FURTHER READING 1.[7] This trust between law enforcement and the community can be as fragile as it is important. And "[i]n some cases, a perceived egregious act of misconduct by a single officer in one city not only damages police-community relationships locally; it can gain nationwide attention and reduce trust of the police generally." *Ibid.* Granting immunity to such egregious acts is sure to decrease public trust and confidence in police, which affirmatively harms law-enforcement interests. This Court's review is needed to vindicate these vitally important interests in this case.

II. Permitting The Tenth Circuit's Decision To Stand Would Undermine Vital Law-Enforcement Objectives.

According to the allegations in petitioner's complaint—which must be credited at this stage in the proceedings—the officers in this case actually interrupted their legitimate investigation to "order [her] to stop" praying "so that they [could] * * * harass her." App. 8a; see also App. 13a (officers "order[ed] her to stand up and stop praying so they [could] harass her"). No one disputes that legitimate law-enforcement objectives

---

[7] Available at https://www.justice.gov/crs/file/836486/download (last visited Dec. 2, 2017).

may permit—or even require—a police officer to order a citizen to cease praying. The narrow (but exceedingly important) issue presented in this case is whether officers who interfere with prayer for the sole purpose of harassment are entitled to qualified immunity—simply because no case has ever held that they cannot.

Amici readily acknowledge that law-enforcement officers must be able to fulfill their duties free from unnecessary interference. But declining to immunize conduct that intrudes on religious expression solely for the purpose of harassment does not risk any such interference. Here, the Tenth Circuit thought that it was not obviously unlawful for officers to command a person to stop praying for the purpose of harassment solely because police officers could command a subject to "stand up and direct his or her attention to the officer[s]" for the purpose of continuing their investigation. App. 9a. But the legality of law-enforcement actions routinely turns on *why* an officer took an action, i.e., whether there was any justification for it. Reasonable officers would understand that merely because an action may be justified in some circumstances does not mean that the action is justified in all circumstances.

For example, when evaluating whether prison officials can legally interfere with a prisoner's right to pray, courts routinely consider the justification for the prison officials' actions. See *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 353 (1987) (holding that it was reasonable for officials to prohibit prisoners from leaving work to attend religious services for safety

purposes when the prison lacked adequate employee resources); *Turner* v. *Safley*, 482 U.S. 78, 87 (1987) (holding that the analysis depends on whether the government action "is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns"); see also *Salahuddin* v. *Goord*, 467 F.3d 263, 279 (2d Cir. 2006) (denying "[s]ummary judgment on the basis of qualified immunity" because "it was clearly established law at the time of the alleged violations that religious exercise may not be denied without any reason"). Thus, in the prison context, law-enforcement officers cannot interfere with prayer unless the interference "is reasonably related to legitimate penological interests." *O'Lone*, 482 U.S. at 349; *Salahuddin*, 467 F.3d at 274. It would be odd, to say the least, to afford citizens like petitioner *less* constitutional protection in their own homes than prisoners enjoy while incarcerated. But that is the unfortunate result of the Tenth Circuit's holding.

It is enough, in this case, that the officers ordered petitioner to stop praying with no justification whatsoever—the allegations belie any concerns for officer safety or any legitimate law-enforcement objectives that petitioner's prayer interfered with. Far from hindering law enforcement, allowing a suspect to engage in a moment of reflection—including prayer—can assist officers in accomplishing a peaceful resolution to a tense encounter, thereby decreasing the risks to officers and the public. As this Court has recognized, encounters between police and citizens can often involve

tense and rapidly evolving situations. See generally *Graham* v. *Connor*, 490 U.S. 386 (1989). De-escalating these situations benefits both law enforcement and the public. As the Department of Justice explained, "the best approach * * * is usually to slow the situation down, so that the officer has more time to * * * assess the situation * * * and formulate a plan for de-escalating the situation." U.S. DEP'T OF JUSTICE CMTY. RELATIONS SERV., COMMUNITY RELATIONS SERVICES TOOLKIT FOR POLICING: GUIDE TO CRITICAL ISSUES IN POLICING 4-5.[8]

In contrast, immunizing officers who interfere with prayer solely to harass a citizen serves no legitimate law-enforcement purpose—if anything, it undermines that vital purpose. This Court's review is needed to restore the balance this Court has struck in its qualified-immunity cases between "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231.

---

[8] Available at https://www.justice.gov/crs/file/836416/download (last visited Dec. 14, 2017).

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Tenth Circuit reversed.

December 20, 2017 Respectfully submitted,

ALLYSON N. HO
Counsel of Record
JAMES D. NELSON
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
T. 214.466.4000
F. 214.466.4001
allyson.ho@morganlewis.com

WILLIAM R. PETERSON
LYNNE N. POWERS
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, Texas 77002
T. 713.890.5000
F. 713.890.5001